Gary M. Epstein
Direct Dial: (202) 637-2249
gary.epstein@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: (202) 637-2200 Fax: (202) 637-2201
www.lw.com

LATHAM & WATKINS LLP

File No. 037146-0000

September 13, 2004

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

This letter is filed on behalf of the Intercarrier Compensation Forum (ICF). It follows up on earlier presentations to the Commission by individual ICF members concerning the relationship between (i) the Commission's resolution of its remand proceeding concerning intercarrier compensation for ISP-bound traffic and (ii) the Commission's ability to adopt a comprehensive, national framework for reforming all intercarrier compensation.

We understand that the Commission is considering issuing an order on remand in its proceeding regarding intercarrier compensation for ISP-bound traffic, and that the Commission may find that this traffic falls within the scope of its section 201 jurisdiction over interstate traffic. If the Commission so finds, it can and should take care to preserve its ability later to adopt a unified intercarrier compensation regime for all telecommunications traffic. Specifically, if the Commission relies on its section 201 authority in the remand proceeding, it need not and should not rely on a theory that particular categories of traffic are beyond even the potential scope of section 251(b)(5). Such a finding could complicate the Commission's efforts to use that provision later to exercise jurisdiction under *Iowa Utilities Board* over *other* types of traffic that might be found to fall *outside* the scope of the Commission's traditional 201 authority over interstate traffic.[1]

---

[1] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (holding that the Commission has plenary jurisdiction to address any issues arising under sections 251 and 252, whether or not those issues independently fall within the scope of the Commission's traditional section 201 authority over interstate traffic). As individual ICF members explain in separate filings, if the Commission wishes to adopt a transition for ISP-bound traffic, there are various bases on

In particular, the Commission should not resolve, within the narrow confines of the ISP remand proceeding, *any* issue concerning the scope of section 251(b)(5) that might have broader significance for the Commission's subsequent authority to impose a unified intercarrier compensation regime for all traffic. No matter how the scope of section 251(b)(5) is defined, the Commission has ample authority to retain a reasonable transitional intercarrier compensation regime for ISP-bound traffic and ultimately to transition all traffic – including access, non-access and ISP-bound traffic[2] – to bill and keep, subject to protections for transport provided by certain rural carriers, as the ICF plan proposes.[3] First, if ISP-bound traffic is *not* subject to the pricing rules of section 251(b)(5) and section 252(d)(2), the "just and reasonable" standard of section 201 would apply to such traffic, and the Commission could order a transition to bill and keep as provided in the ICF Plan. By the same token, if ISP-bound traffic *is* subject to the pricing rules of sections 251(b)(5) and 252(d)(2), the Commission retains equal authority to impose a transition to bill and keep, as provided in the Plan, for that and other traffic subject to those provisions. As the D.C. Circuit noted when it remanded the Commission's previous order,[4] section 252(d)(2)(B)(i) contains a "bill-and-keep" savings clause that makes no reference to whether telecommunications traffic is balanced or

---

which it can do so without compromising its ability to establish a unified bill-and-keep regime for all traffic, including traffic that is subject to the pricing rules of sections 251(b)(5) and 252(d)(2). *See Ex Parte* Letter from David L. Lawson, Sidley Austin Brown & Wood LLP, Counsel for AT&T Corp., to Marlene H. Dortch, CC Docket Nos. 01-92, 99-68, 96-98, filed Sept. 8, 2004; *Ex Parte* Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC Communications, Inc., to Marlene H. Dortch, CC Docket Nos. 01-92, 99-68, 96-98, filed Sept. 13, 2004; *Ex Parte* Letter from John T. Nakahata, Harris Wiltshire & Grannis LLP, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, CC Docket Nos. 01-92, 99-68, 96-98, filed Sept. 13, 2004.

[2] ICF members disagree as to whether ISP-bound traffic is classified as access or non-access under today's rules. For clarity, and without prejudice to parties' positions, ISP-bound traffic has been separately identified herein.

[3] The ICF Plan does not call for an immediate shift to bill and keep for ISP-bound traffic; instead, it calls for an orderly transition from current rate levels to bill and keep over time, reaching bill and keep in 2011, with substantial rate reductions beginning in July 2005 and resolution of other compensation-related issues such as the treatment of ISP-bound foreign exchange traffic as compensable to the carrier serving the ISP. Again, however, the Commission has ample authority to adopt that approach no matter what the scope of section 251(b)(5). In a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission's expansive authority to take reasonable interim measures needed to protect the industry from sudden disruptions. *See, e.g.*, *CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002); *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

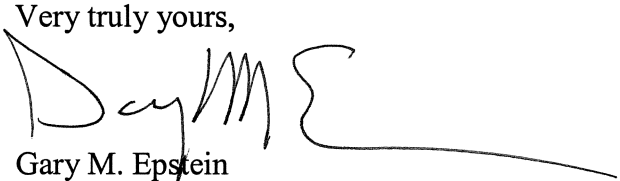
[4] *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (declining to vacate the *ISP Remand Order* because "there is plainly a non-trivial likelihood that the Commission has authority to elect" bill and keep under alternative theories, and specifically citing the bill-and-keep savings clause for that proposition).

not. Some ICF members also believe that the Commission has independent authority to reach the same result in interpreting the "additional costs" standard of section 252(d)(2)(A)(ii).

The parties will address these and other legal issues, including the scope of the bill-and-keep savings clause, in subsequent filings in support of the ICF Plan itself. Our principal submission for now is that, in resolving the ISP-bound traffic controversy, the Commission should not decide important questions of industry-wide significance about the scope of section 251(b)(5), which the Commission may later need to invoke as a basis for *Iowa Utilities Board* jurisdiction over non-interstate traffic.

Apart from our general point that the Commission should avoid narrowing the scope of section 251(b)(5) in the ISP-bound traffic proceeding, we have specific concerns about resolving that proceeding by concluding that only traffic that originates and terminates in the same local calling area is within the potential reach of section 251(b)(5). Any such ruling could seriously weaken the Commission's ability to invoke that provision in a variety of contexts as the basis for jurisdiction over non-interstate traffic. Such a narrow view of the statute, for example, could exclude intrastate long distance calls from the ambit of section 251(b)(5). More generally, it could needlessly compromise the Commission's efforts to complete comprehensive intercarrier compensation reform in a timely, efficient and administrable manner. Section 251(b)(5) provides the Commission with the broad authority to address both interstate and *intrastate* traffic, which will be necessary to accomplish meaningful reform, and there is no need for the Commission to interpret the Act to create limits on its authority to insist upon uniform compensation rules for *all* traffic. The possibility of perpetuating differing rate regulation schemes for particular categories of IP-enabled and other calls raises a host of arbitrage and competitive equity issues that the Commission should find very troubling, and the Commission should therefore take great care not to constrict its future authority over intercarrier compensation.

Very truly yours,



Gary M. Epstein
Richard R. Cameron

Counsel for the Intercarrier Compensation Forum

cc:

Austin Schlick	Jeff Dygert
Chris Killion	Jane Jackson
Rob Tanner	Tamara Preiss
Steve Morris	Victoria Schlesinger
Christopher Libertelli	Dan Gonzalez
Scott Bergmann	Jessica Rosenworcel
Matt Brill	